UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Milwaukee, WI

BLACKHAWK EXCAVATING II, INC.[1]

Employer

and **Case 30-RC-6707**

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

International Union of Operating Engineers, Local 139, AFL-CIO (Petitoner) filed a petition seeking to represent certain employees of Blackhawk Excavating II, Inc. (Employer) The parties stipulated that the following unit is an appropriate unit for the purposes of collective bargaining:

> All full-time and regular part-time heavy equipment operators, pipe layers, and lowboy operators employed by the Employer at its South Wayne, WI facility; excluding all over the road dump truck drivers, office and clerical employees, professional employees, sales representatives, full time laborers, and guards and supervisors as defined in the Act.

A hearing was held before a hearing officer of the National Labor Relations Board to determine whether Toby Seffrood is a supervisor as defined in Section 2(11) of the National Labor Relations Act (Act).[2] The Employer contends Seffrood is a supervisor and should not be

[1]The name of the Employer appears as amended at hearing.

[2] Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Timely briefs from the Employer and Petitioner have been received and considered, and upon the entire record in this proceeding, the undersigned finds: 1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed. 2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction. The parties stipulated, and I find, that the Employer is a corporation currently engaged in the construction business from its South Wayne, Wisconsin location. During the past calendar year, a representative period, the Employer purchased goods and materials valued in excess

allowed to participate in the election, while the Petitioner contends that Seffrood is a heavy equipment operator properly included in the bargaining unit.[3] After considering the evidence produced during the hearing and the arguments of the parties, I conclude, for the reasons stated below, that Seffrood is a supervisor and is therefore excluded from the bargaining unit and not eligible to vote in an election in the above-referenced unit.[4]

FACTS

A. The Employer's Operations

Charles Wamsley purchased the Employer in June, 2007, from Jim Moe, who operated the company under the name Blackhawk Excavating, Inc. Upon purchasing the assets of the company, Wamsley changed the name to Blackhawk Excavating II, Inc.[5] The Employer is engaged in the business of laying underground sewer and water pipes. Ninety percent of this work is performed for municipalities and the rest for private entities.

Wamsley is the Employer's owner and president, but also owns another company, Wamsley Excavating. Wamsley testified that he spends 25% of his time dealing with the Employer, with the remainder of his time spent at Wamsley Excavating. Moe was retained as the Employer's general manager. Moe was responsible for bidding jobs, handling pre-construction matters, and passing on instruction to the work crews. Moe ceased employment with the

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of $50,000 directly from suppliers located outside the State of Wisconsin. 3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act. 4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[3] In its brief, for the first time, the Employer raised the argument that Seffrood is also a managerial employee and therefore should be excluded from the bargaining unit. However, this argument was not raised at the hearing and both parties were asked whether there were any additional issues beyond the claim that Seffrood is a supervisor. Therefore, I am not considering the argument that Seffrood is a managerial employee in this decision.

[4] The parties stipulated at hearing that the Employer is engaged in the construction industry and therefore it is appropriate to use the *Daniel/Steiny* eligibility formula to determine the voter eligibility list. I agree.

[5] The Petitioner, during the hearing, contended that the proper legal name of the Employer should be Blackhawk Excavating II, Inc. a/k/a Blackhawk Excavating, Inc. However, as the testimony in the record shows, at the time of the sale, the legal name was changed to Blackhawk Excavating II, Inc. and I affirm the hearing officer's decision to amend the formal papers to reflect this name.

Employer at the end of 2007. Don Mergen was hired in fall, 2007 and is now the general manager, performing the same duties formerly performed by Moe. The general manager is supervised by Wamsley.

The Employer's business is seasonal in nature, operating generally from March through December. During the construction season of 2007, the Employer operated two work crews, consisting of approximately five employees each.[6] According to Wamsley, each crew had a supervisor or foreman (the Employer uses the terms interchangeably), Seffrood on one crew and Keith Totman on the other.[7] The supervisors reported to both Moe and Wamsley. The work crews consisted of laborers and equipment operators, and they reported to the supervisor on the jobsite. Employees generally worked 5 days a week. At the end of the construction season, all the equipment operators and laborers were laid off. Currently only Wamsley, Mergen, and a secretary, Sue Blaser, are on the Employer's payroll.

In order to secure work, the Employer has to submit bids. The general manager is responsible for submitting bids for the Employer. In 2007, Moe was in charge of this process, but Seffrood assisted in the bid process by providing suggestions in creating the bid. However, Moe was responsible for coming up with the actual numbers for the bid. Once the Employer was awarded a job, Moe and Seffrood would meet with a city engineer to perform a site inspection. Then, Moe and Seffrood would have a lengthy meeting (approximately 4 hours) with each other to go over the details of the job, including the blueprints, when the job would start, end, etc. The blueprints contained detailed information about what would happen on each job, such as what kind of traffic control would be necessary, exactly where to dig the hole, how far to dig, the pipe

[6] All evidence discussed below is from the 2007 construction season.
[7] Totman, whom Seffrood testified was "new," voluntary separated from the Employer around August, 2007, after which time Seffrood was responsible for both crews.

to be replaced and what kind of fill would be used for the hole. Seffrood and Moe made recommendations to each other about how best to do the job during this meeting. Also during this meeting, Moe would determine which employees would work on the job and what equipment each employee would run.

On a daily basis, employees would report to the Employer's facility in the morning, at around 6 a.m., and have a meeting with Moe. This meeting lasted approximately 30 minutes, during which Moe would outline what work needed to be accomplished during the day and who would be performing what work. On the jobsite, Seffrood was the highest-ranking Employer official. If an employee was having problems on the site, the employee would tell Seffrood. Seffrood would resolve problems that he considered minor, but otherwise would call Moe to get resolution of the problems. At the end of the workday, between 4 and 5 p.m., employees would report back to the Employer's facility. On the drive back to the Employer's facility, Seffrood would have a cell phone conversation with Moe to report what happened on the jobsite that day and discuss what needed to be done the following day. Then, when the employees got back to the Employer's facility, there would be another meeting with Moe to go over what Seffrood and Moe had just discussed. This routine generally happened every day.

B. Supervisory responsibilities

1. *Assignment of work and responsible direction*

Prior to starting any job, Seffrood and Moe had a meeting to discuss the job and go over the blueprints. During this initial meeting, Moe assigned the employees who would be working on the crew and what jobs they would be performing, although Seffrood made recommendations during this meeting. Seffrood testified that if he did not agree with Moe as to how a job should be done or what assignments were made, Moe had the final say. Then, as described above, the

employees would have a daily morning meeting with Moe during which Moe would assign tasks and jobs to the employees for that day.

Once on the jobsite, Seffrood testified he ran a backhoe and he did this approximately 90% of the time.[8] However, Seffrood also testified that he was the highest-ranking employee on the jobsite when Moe was not there, and Moe was only on the jobsite about once a week for an hour. Otherwise, employees would bring to Seffrood any problems and concerns that were raised as the job was being done. In addition, if the city engineer had a concern regarding the project, this concern would be raised with Seffrood. Seffrood testified that most of the time, when there was a problem, he would call Moe to find out what to do. In fact, Seffrood said he talked to Moe approximately five times a day by phone. However, Seffrood testified that he did solve some problems on his own. For instance, on one jobsite, Seffrood testified that he sent an employee from the jobsite to buy cinder blocks to aid in blocking a water main. In addition, Seffrood has moved employees around on the jobsite depending on what skills were needed in a specific area. Seffrood testified that these moves may last for a day or for the duration of a job.

Seffrood testified that during the course of a given job, the employees generally knew what needed to be done and how to accomplish it so there was not a lot of day-to-day direction that needed to be given. However, as stated above, Seffrood sent at least one employee from a jobsite to purchase needed supplies with the company credit card and he did not need to get approval to do this. In addition, Seffrood testified about an incident where he went to Totman's jobsite on his own initiative to deal with a problem employee. Once at Totman's jobsite, as

[8] Wamsley also testified about the amount of time Seffrood performed work versus doing supervisory tasks. Initially, Wamsley testified that Seffrood spent about 80% of his time on supervisory duties. Under questioning by the hearing officer, Wamsley testified that Seffrood spent about 60% of his time "overseeing" and making sure the job gets done. However, Wamsley's testimony was less reliable as he testified that he is only on jobsites approximately 5% of the time.

reflected in Employer's Exhibit 1, Seffrood sent one of the employees from Totman's work crew to go to the hotel to find one of the other employees. Finally, Seffrood has moved employees around as needed on the jobsite based on his evaluation of their skills and abilities. Regarding accountability, Seffrood testified that he was never told he could be disciplined if a job went longer than it was scheduled.

Regarding employee time off, Seffrood testified that in case of bad weather, he would call Moe to find out what to do. However, if he couldn't reach Moe, Seffrood testified that he had the authority to send the work crew home for the day. In addition, Seffrood said employees could call him to report they were sick if they were unable to reach Moe. However, Seffrood said he usually found out from Moe if an employee was not going to be present on a given day. Seffrood testified that employee requests for personal time off were handled through Moe. Regarding overtime, only one incident was raised during the hearing, when the crew was on a project in Highland, Wisconsin. The employees were almost finished laying a pipe on a Friday afternoon and Seffrood called Wamsley to get permission to have the crew continue working until the pipe was connected. Wamsley gave Seffrood permission to work the overtime.

2. *Layoff, transfer, and hiring of employees*

Regarding layoffs, at one point during the season, there was only one work crew operating. Wamsley asked Seffrood what the employees were doing as there was only the one crew working. About a week later, Seffrood contacted Wamsley and told him that Bob Patterson and Bill Seffrood (Toby's cousin) were cleaning the end loader in the shop. Seffrood testified that he told Wamsley that it didn't make sense to keep Patterson and Bill Seffrood on the payroll any longer. As a result, Patterson and Bill Seffrood were laid off. There is no evidence that the

decision to lay the employees off was based on anything other than Seffrood's conversation with Wamsley.

Regarding transfers, Seffrood testified about an incident that occurred involving another of his cousins, Terry Seffrood. Terry Seffrood was on Totman's crew and Totman called Toby Seffrood to complain that Terry was having problems reporting to work on time. Toby recommended that Terry be transferred to his crew and Arleigh "Ned" Swanson be transferred from Toby's crew to Totman's crew. Toby called Moe to discuss this and Moe agreed with Toby's recommendation. As a result, Terry Seffrood was transferred to Toby's crew and Swanson was transferred to Totman's crew. This was the only time employees were transferred during the 2007 construction season.[9]

Seffrood testified that he is not involved in interviewing or hiring employees and that he has never been given the authority to hire employees. However, he did recommend two people to Wamsley whom Seffrood thought would be good employees. Wamsley had asked whether Seffrood knew anyone who was capable of running a dirt crew. Seffrood couldn't think of anyone at the time. However, about a week later, Seffrood told Wamsley that Brad Bowden had worked at the company before, had experience excavating, and that Bowden would be a great asset to the Company. Wamsley testified that based on this recommendation, he called Bowden to discuss working for the Employer but Bowden declined. Wamsley testified that he otherwise would have hired Bowden based in part on Seffrood's recommendation, but also on the phone conversation Wamsley had with Bowden. Seffrood also told Wamsley about his cousin, Tony

[9] The Petitioner, in its brief, contends that this incident occurred prior to Wamsley's purchase of the company and therefore should not be considered as evidence of Seffrood's current duties and responsibilities. The record does not indicate specifically when in 2007 this incident took place. However, Seffrood testified that his day-to-day working conditions did not change when the company was sold and neither party raised an objection to this testimony being included in the record during the hearing. Therefore, I am considering this incident as evidence in this matter.

Seffrood, and Wamsley contacted Tony Seffrood about employment as well. Wamsley testified that Tony Seffrood was interested in employment but not at that time.

3. *Rewarding and disciplining employees*

On the issue of rewarding employees, during the 2007 construction season, employee Doug Busch referred some work to the Employer. Because of this, Seffrood told Wamsley that Busch should be rewarded because the Employer got the work. Wamsley testified that because of Seffrood's comments that Busch be rewarded, Wamsley gave Busch a bonus. In addition, Seffrood testified that he recommended to Moe that two new employees be given raises. According to Wamsley, these employees got raises because of Seffrood's recommendation. Finally, Seffrood testified that one evening, on the way back from a jobsite, he called Wamsley and suggested that he be allowed to use the company credit card to buy his work crew dinner. Wamsley agreed with this recommendation.

Regarding discipline, Seffrood testified about an incident from May, 2007.[10] In May, the other foreman, Totman, called Seffrood at around 10 p.m., to tell him that employee Ned Swanson was being unruly at the hotel where Totman and his crew were staying. Totman called Seffrood because, as Seffrood testified, Totman was a new employee and Seffrood was more familiar with the employees on Totman's crew. The following morning, Seffrood, on his own initiative, drove to where Totman's crew was working. On the way, Seffrood talked with Moe and told Moe that he was going to check out the situation. According to Employer's Exhibit 1, a statement Seffrood later wrote regarding the incident, when Seffrood arrived at the site, Swanson was not there, so Seffrood sent employee Doug Busch to the hotel to find Swanson. When

[10] Again, the Petitioner contends that this incident should not be considered as evidence as it occurred prior to Wamsley's purchase of the company. However, as stated above, Seffrood testified that his day-to-day working conditions did not change after the sale and neither party objected to this testimony being included in the record. Therefore, I am considering this incident as evidence.

Swanson arrived at the jobsite, he appeared intoxicated. Swanson threatened to leave and quit. Seffrood told Swanson "There's the highway." Apparently Swanson left. Seffrood testified that he did not terminate Swanson, but rather Swanson quit after this incident. Seffrood did not call Moe again to discuss the situation until after Swanson left. Seffrood testified that had Swanson not left the jobsite on his own, Seffrood would have directed him to leave. Seffrood further testified that if there had been other disturbances on his work crew during the construction season, he would have dealt with the situations appropriately.

4. *Secondary indicia*

As stated above, Seffrood sometimes assists Moe in preparing bids for jobs and attends site inspections with Moe prior to beginning a job. After that, Seffrood and Moe have a lengthy meeting to discuss exactly how the job will be done. No other employees attend these meetings. Seffrood testified that he has a company credit card in his name and no other employees have a company credit card. Seffrood is paid $22 an hour, at least $2 an hour more than the next highest paid employee. However, Seffrood did not receive this rate of pay until October, 2007, and only after he had received a different job offer. Prior to October, 2007, Seffrood made $20 an hour. Seffrood is identified as Foreman on a company experience list, which is a list that sometimes accompanies a bid to show a customer the experience of the Employer's employees.

LEGAL ANALYSIS

1. *The general legal standard and independent judgment*

Section 2(11) of the Act defines a supervisor as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with

> the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

The Board recently revisited the issue of supervisory status in *Oakwood Healthcare, Inc.,* 348 NLRB No. 37 (September 29, 2006) and two companion cases, *Croft Metals, Inc.,* 348 NLRB No. 38 (September 29, 2006) and *Golden Crest Healthcare Center,* 348 NLRB No. 39 (September 29, 2006). In *Oakwood Healthcare, Inc.*, the Board reaffirmed that the burden of proving supervisory status rests on the party asserting it. See *Oakwood Healthcare, Inc*., supra, slip op. at 9 (citations omitted); and *Golden Crest Healthcare Center*, supra, slip op. at 5. The Board further held the party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Oakwood Healthcare*, supra; *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999).

In *Avante at Wilson, Inc.*, 348 NLRB No. 71, slip op. at 2 (October 31, 2006), the Board specifically held that generalized or conclusory testimony will not satisfy the evidentiary burden. *Id.* (citing *Golden Crest Healthcare Center*, supra, slip op. at 5 (2006) (recognizing that "purely conclusory evidence is not sufficient to establish supervisory status," and pointing out that the Board "requires evidence that the employee actually possesses the Section 2(11) authority at issue"); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without supporting evidence do not establish supervisory authority); *Sears Roebuck & Co.,* 304 NLRB 193, 193 (1991) (same)). There must be specific evidence regarding a purported supervisor's authority to take or effectively recommend one of the twelve supervisory indicia, as well as the individual's use of independent judgment in making those decisions. *Id.*

The Board noted in *Oakwood Healthcare*, supra at fn. 27, that in considering whether the individuals at issue possess any of the supervisory authority set forth in Section 2(11) of the Act,

Congress emphasized its intention that supervisors are above the grade of "straw bosses, leadmen, set-up men and other minor supervisory employees." Thus, the ability to give "some instructions or minor orders to other employees" does not confer supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985). Indeed, such "minor supervisory duties" should not be used to deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles,* 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital,* 322 NLRB 1107, 1114 (1997).

Regardless of which one (or more) of the twelve indicia the purported supervisor possesses, he or she must exercise independent judgment in taking those actions, and the decisions cannot be merely routine or clerical. In *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001), the Supreme Court rejected the Board's interpretation of "independent judgment" to exclude the exercise of "ordinary professional or technical judgment in directing less skilled employees to deliver services." Following the admonitions of the Supreme Court, the Board in *Oakwood Healthcare, Inc.* adopted a definition of the term "independent judgment" that "applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise….professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." *Oakwood Healthcare, Inc.*, supra, slip op. at 7. The Board noted that the term "independent judgment" must be interpreted in contrast with the statutory language, "not of a merely routine or clerical nature." *Id.*, slip op. at 8. Consistent

with the view of the Supreme Court, the Board held that, "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id.* (citation omitted). However, "…the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." *Id.* The Board held as follows on the meaning of "independent judgment":

> To ascertain the contours of "independent judgment," we turn first to the ordinary meaning of the term. "Independent" means "not subject to control by others." *Webster's Third New International Dictionary* 1148 (1981). "Judgment" means "the action of judging; the mental or intellectual process of forming an opinion or evaluation by discerning and comparing." *Webster's Third New International Dictionary* 1223 (1981). Thus, as a starting point, to exercise "independent judgment" an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.

Oakwood Healthcare, Inc., supra, slip op. at 9.

2. *The legal standard for effective recommendation*

As stated above, the statutory definition of supervisor includes those who "effectively" recommend such actions as hiring, rewarding, disciplining and transferring employees. The Board has consistently required that recommendations by alleged supervisors be shown to have some independent effect. In *Brown & Root, Inc.*, 314 NLRB 19 (1994), safety inspectors who issued safety "citations" were found not to be supervisors because the acknowledged supervisors independently investigated the incidents before deciding whether to take disciplinary action. Therefore, the inspectors' citations were found not to have any independent disciplinary effect. In *Children's Farm Home*, 324 NLRB 61 (1997), although the team leaders' evaluations of employees sometimes recommended whether to grant a wage increase, the undisputed supervisors conducted their own independent investigations before deciding on an increase. In

Training School at Vineland, 332 NLRB 1412 (2000), the group home managers sometimes recommended that discipline be imposed on employees. However, the record showed that, in many instances, the employer either chose not to adopt the recommendations, or simply ignored the recommendations altogether. In those circumstances, "it cannot be said that the group home managers' recommendations are effective." *Id.* at 1417. Thus, for the Board to find recommendations to be "effective," there must be some evidence that the recommendations have some independent effect or, at the very least, that they are normally followed. See also *Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001) (stores' meat manager and seafood managers found to be supervisors because they (1) interviewed candidates on their own and made recommendations that were accepted by the food managers without independent investigation, or (2) attended interviews with the food manager, and their resulting recommendations were "typically followed"); *Wal-Mart Stores, Inc.*, 335 NLRB 1310 (2001) (store's department manager "effectively" rewarded employees because the ratings he assigned in their evaluations directly affected their pay increase, without independent investigation by superiors).

Thus, it is well established that evidence of actual effectiveness is required to prove supervisory status based on the authority "effectively to recommend" personnel actions such as disciplining, discharging, hiring and rewarding employees. On one hand, if management completely ignores an employee's recommendations, or acts on them only after completing its own investigation, the recommendations cannot be seen to carry much weight. On the other hand, if there is evidence that the recommendations are usually followed, or that they have independent effect without substantial investigation and review by management, then a finding of supervisory status would be warranted.

3. *Seffrood's ability to lay off or transfer employees or effectively recommend the same*

On the layoff issue, as stated above, when Wamsley asked what employees were doing, Seffrood informed Wamsley that two employees were just working in the shop and it didn't make sense to keep the employees on the payroll. Wamsley testified that based on this conversation with Seffrood, he decided the employees should be laid off. There is no evidence that Wamsley conducted an independent investigation into the employees' actions. Rather, he contacted Moe to inform the employees that they were laid off. The Petitioner contends that Seffrood did not recommend that the employees be laid off, but rather advised Wamsley of what the employees were doing. However, Seffrood testified that he told Wamsley that it didn't make sense to let the guys continue on the payroll. I find that this is an effective recommendation of layoff.

Regarding transfers, Seffrood testified that it was his decision to have Terry Seffrood transferred to his work crew and that Moe followed this recommendation without conducting an independent investigation. Rather, Toby Seffrood called Moe to tell him what was happening and Moe, in the same conversation, agreed that Terry Seffrood should be transferred to Toby Seffrood's work crew. The Petitioner contends that the evidence fails to disclose the impact of Seffrood's recommendation to Moe, so it cannot be said that Seffrood effectively recommended Terry's transfer. However, based on the fact that Moe heard Seffrood's evaluation of the situation and immediately agreed that Terry should be transferred within one conversation, it can be inferred that Moe relied solely on Seffrood's recommendation in approving Terry's transfer. Thus, I conclude that Seffrood has the ability to effectively recommend transfers of employees.[11]

[11] In the layoff and transfer section above in the facts, there was also a discussion of Seffrood's role in the hiring process. Seffrood testified he recommended two people to be hired and that he told Wamsley that one of the people, Bowden, would be an asset to the company. Wamsley testified that if either person had been interested in the job, he

4. *Seffrood's ability to reward or discipline employees or effectively recommend the same*

Regarding rewarding employees, the evidence shows that employees received rewards on at least three separate occasions because of Seffrood's recommendation. Doug Busch received a bonus because Seffrood told Wamsley to reward Busch for giving the Employer some work. Two employees received raises because of Seffrood's comments on their work performance and recommendation that they receive raises. Finally, employees received dinner purchased by the Employer based on Seffrood's recommendation. The Petitioner contends that Seffrood did not effectively recommend rewards because his recommendations lacked specificity and Seffrood was not aware if the recommendations were ultimately followed. However, the Petitioner fails to cite any case law stating that recommendations need to be specific in nature and that the person making recommendations needs to know the recommendation was followed. The Petitioner cites *Johnson Bronze Company*, 232 NLRB 845 (1977) as an example where machine setters were found to be supervisors because of the role they played in determining raises, but the case fails to state that the setters provided specific monetary recommendations as to what the raise should be. Rather, it states merely that the setters' assessment of the operator's performance played a role in determining whether operators were rewarded with merit raises. *Id* at 846. In the instant case, while Seffrood may not have specified a certain amount to give Busch as a bonus or the new employees as a pay increase, it is clear that his recommendations were followed. In addition, Seffrood did specify that the Employer should purchase dinner for the employees and this recommendation was followed. I conclude that these events constitute evidence that Seffrood has the ability to effectively recommend rewards.

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would have hired him at least in part because of Seffrood's recommendation. However, neither employee was hired and Wamsley also testified that he talked with each person regarding their experience before deciding to offer them employment. Therefore, I find the evidence inconclusive as to exactly what role Seffrood's recommendations play in the hiring process.

Regarding discipline, Seffrood testified about the Swanson incident. While he contends that Swanson quit and Seffrood did not discipline or terminate him, Seffrood testified that he would have taken action to remove Swanson from the jobsite had Swanson not left voluntarily. In fact, during the incident, when Swanson threatened to quit, Seffrood told him, "There's the highway." Seffrood testified that no other incidents occurred in the 2007 construction season that required discipline, but he also testified that he knew he had the authority to take care of disturbances on the jobsite. The Board, in *Northcrest Nursing Home*, 313 NLRB 491 (1993), stated "If an individual can discipline or effectively recommend discipline of other employees, the individual will be found supervisory." (Footnote omitted) I conclude that Seffrood is a supervisor based on his ability to discipline employees by sending them off a jobsite or taking care of problems that arise on a jobsite. The Petitioner contends that because there were no examples presented during the hearing which demonstrate that Seffrood disciplined employees, he cannot be found to be a supervisor based on discipline. However, Seffrood testified that he went to Totman's jobsite to "check things out." When Swanson arrived on the jobsite and was unruly, Seffrood told him "there's the highway." Finally, Seffrood testified that if Swanson had not left the jobsite, he would have made sure Swanson left. Based on the Swanson incident and Seffrood's testimony, I find that Seffrood's authority to resolve situations on the jobsite includes the ability to discipline employees by having them leave a jobsite if they are causing problems. This conclusion is bolstered by the fact that Seffrood, at his own instigation and without seeking authorization, left his own jobsite and drove to Totman's jobsite to handle the Swanson incident.

5. *Petitioner's additional legal argument*

Many of the Petitioner's legal arguments have been discussed above. However, the Petitioner raised an additional argument in its brief, contending that Seffrood was never told he

had the authority to hire, reward, lay off, transfer, suspend, or discipline employees. According to the Petitioner, because Seffrood was never informed he had the authority to perform these actions, he cannot be found to be a supervisor, and cited *Golden Crest Healthcare Center*, supra, slip op. at 4, fn. 9 (2006) to support this position. However, *Golden Crest* is distinguishable. First, in *Golden Crest*, the Board was evaluating only whether charge nurses exercised independent judgment in making work assignments. There was no contention that the charge nurses possessed any supervisory indicia besides assignment/responsible direction of work. Second, the Board, in *Tree-Free Fiber Co.,* 328 NLRB 389, 392-393 (1999), adopted the analysis of the ALJ in *Greenspan D.D.S., P.C.*, 318 NLRB 70, 76, (1995) enfd. 101 F.3d 107 (2nd Cir. 1996) which said "[w]hen an individual has not been notified, orally or in writing, that he is vested with a supervisory power, the frequency of exercise of the authority is relevant to a determination of whether in fact the authority has been delegated to him by management."

In the instant case, the Employer contends Seffrood possesses a number of supervisory indicia, which have been discussed above. While Seffrood testified that he was never told specifically that he possessed the aforementioned supervisory indicia, the evidence, including Seffrood's testimony, shows that Seffrood exercised his authority as supervisor on a regular basis and with full knowledge of the Employer. The incident regarding employee Swanson's conduct on a jobsite occurred in May and Seffrood testified that had Swanson not left the jobsite on his own, Seffrood would have made sure he did leave. Seffrood testified that while there were no formal disciplinary situations during the 2007 construction season, he had the authority to deal with situations if they did arise, and was prepared to do so. During summer, 2007, Seffrood effectively recommended that Busch be rewarded for giving the Employer work, that two new employees be given pay increases, and that he should be allowed to take the crew out to dinner

on the company credit card. At some point during the construction season, Seffrood ensured that Terry Seffrood was transferred from Totman's crew to his crew. Finally, towards the end of the construction season, Seffrood effectively recommended that two employees be laid off because there wasn't work for them to do. There is no evidence in the record that Seffrood made any recommendations relating to layoff, transfers, reward, and discipline that were not followed by the Employer.

6. *Conclusion*

Based on all the above, I conclude that Seffrood possessed and exercised his supervisory authority on a regular basis and was prepared to exercise his authority as necessary. While the Employer may not have specifically told Seffrood he possessed these supervisory indicia, it is apparent that Seffrood was aware he had the ability to conduct himself as a supervisor, based on his actions. Thus, I find Seffrood to be a supervisor and that he is excluded from the bargaining unit and not eligible to vote in the election I am directing herein.[12]

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike who have retained

[12] In reaching my finding that Seffrood is a supervisor, I am not deciding whether Seffrood assigns or responsibly directs work as the record is inconclusive as to whether Seffrood uses independent judgment or is held accountable for these actions. I note, without finding, that the Employer possessed the burden to demonstrate that Seffrood is a supervisor and it appears this burden was not met with regard to these particular indicia. See *Oakwood Healthcare*, supra.

their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Additionally eligible are those employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months or who have had some employment in that period and have been employed for a total of 45 working days within the 24 months immediately preceding the payroll period ending immediately preceding the date of this Decision, and also have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.[13] Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by International Union of Operating Engineers, Local 139, AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to the list of voters and their addresses which may be used to communicate with them. *Excelsior*

[13] *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction*, 133 NLRB 264 (1961), modified in 167 NLRB 1078 (1967).

Underwear, Inc., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company,* 384 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer shall file with the undersigned, **two** copies of an election eligibility list, containing the **full** names (including first and last names) and addresses of all the eligible voters, and upon receipt, the undersigned shall make the list available to all parties to the election. To speed preliminary checking and the voting process itself, it is requested that the names be alphabetized. **In order to be timely filed, such list must be received in the Regional Office, 310 West Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53203 on or before February 20, 2008.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by February 27, 2008.**

OTHER ELECTRONIC FILINGS

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the website,

select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

Signed at Milwaukee, Wisconsin on February 13, 2008.

/s/Irving E. Gottschalk

Irving E. Gottschalk, Regional Director
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Thirtieth Region
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